

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

1 RICARDO S. JUARBE-ACEVEDO,
2 et al.,

3 Plaintiffs,

Civil No. 97-1220 (JAF)

4 v.
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6 UNITED STATES OF AMERICA,

7 Defendant.
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MAY 11 2000
U.S. DISTRICT COURT
SAN JUAN, P.R.

10 OPINION AND ORDER

11 Plaintiffs, Ricardo S. Juarbe-Acevedo ("Juarbe"), his wife,
12 María C. Rivera; and their conjugal partnership, inter alia, bring a
13 monetary damages suit against Defendant, the United States of
14 America, pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C.
15 §§ 1346 and 2671 (1993), alleging medical malpractice on the part of
16 the San Juan Veterans' Medical Center ("VA Hospital").
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18 Defendant moves for summary judgement arguing that the running
19 of the appropriate statute of limitations bars Plaintiffs' action.
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I.

21 Factual and Procedural Synopsis

22 Plaintiff Juarbe underwent a laminectomy at the VA Hospital on
23 November 14, 1991. Nearly two weeks after the surgery and while
24 still at the VA Hospital, he developed urinary and fecal
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1 incontinence, general weakness, and a loss of motor movements. On
 2 March 14, 1992, the VA Hospital discharged him, although he continued
 3 to suffer from weakness in the four extremities and dysfunction of
 4 his urinary and fecal sphincters.

5 Given the allegedly deteriorating nature of Plaintiff Juarbe's
 6 condition, he was taken to the J.F.K. Johnson Rehabilitation
 7 Institute in Edison, New Jersey. There, on September 2, 1992, a
 8 doctor evaluated him and diagnosed paraplegia from the thoracic T10
 9 level. Plaintiffs assert that Plaintiff Juarbe visited other
 10 hospitals of the Veterans' Administration before arriving at the
 11 Walter Reed Army Medical Center ("Walter Reed") in Washington, D.C.

13 In July 1993, doctors in the neurosurgery clinic at Walter Reed
 14 saw Plaintiff Juarbe, but did not admit him at this time. Three
 15 months later, in October 1993, Plaintiff Juarbe developed severe
 16 headaches, fever, photophobia, and a stiff neck. The doctors at
 17 Walter Reed diagnosed aseptic meningitis and an urinary tract
 18 infection, and admitted him. Following a magnetic resonance test
 19 ("MRI"), which revealed a tumor wrapped around the middle and lower
 20 portions of the spinal medulla, doctors at Walter Reed performed a
 22 posterior laminectomy on Plaintiff Juarbe on December 15, 1993. He
 23 was discharged on January 4, 1994, only to be readmitted on
 24 January 29, 1994, for headaches and papilledema. As a result of
 25 their examination of Plaintiff Juarbe, doctors at Walter Reed

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concluded that he did not suffer from bacterial meningitis, but
 1 rather that the abnormalities revealed during the lumbar punctures
 2 were of a chronic origin and possibly related to post-operative
 3 changes and his necrotic spinal cord. Walter Reed discharged
 4 Plaintiff Juarbe on February 21, 1994.

6 On February 20, 1996, Plaintiffs filed separate administrative
 7 claims before the Department of Veterans' Affairs ("VA"), alleging
 8 negligence on the part of the VA Hospital in treating Plaintiff
 9 Juarbe. On October 30, 1997, the VA formally denied Plaintiffs'
 10 claims. In its letter of denial, the VA stated that Plaintiffs
 11 alleged:

13 [N]egligence on the basis that the medical staff
 14 of the San Juan VA Medical Center failed to
 15 diagnose, treat and take neurosyphilis into
 16 account before performing a cervical posterior
 17 total laminectomy and foraminotomy surgery which
 18 was a contraindicated surgical intervention,
 19 followed by neglect post-operative treatment.

20 Docket Document No. 15, Exh. D.

21 On February 19, 1997, Plaintiffs filed the present federal
 22 complaint. On November 14, 1997, the government moved to dismiss
 23 arguing that we lacked subject matter jurisdiction because Plaintiffs
 24 allegedly did not exhaust their administrative remedies and the
 25 applicable statute of limitations barred their claim. We
 26 subsequently denied the motion to dismiss, holding that:
 27 (1) Plaintiffs satisfied the administrative exhaustion requirements

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1 by providing adequate written notice to the VA; and (2) the statute
2 of limitations did not bar Plaintiffs' claim.

3 Allegedly based upon the recent discovery of Plaintiff Juarbe's
4 claim for benefits pursuant to 38 U.S.C. § 1151 (1988),¹ Defendant

5 _____
6 ¹Section 1151 provides, in relevant part, that:

7 Compensation under this chapter and dependency
8 and indemnity compensation under chapter 13 of
9 this title shall be awarded for a qualifying
10 additional disability or a qualifying death of a
11 veteran in the same manner as if such additional
12 disability or death were service-connected. For
13 purposes of this section, a disability or death
14 is a qualifying additional disability or
15 qualifying death if the disability or death was
16 not the result of the veteran's willful
17 misconduct and-

18 (1) the disability or death was caused by
19 hospital care, medical or surgical treatment, or
20 examination furnished the veteran under any law
21 administered by the Secretary, either by a
22 Department employee or in a Department facility
23 as defined in section 1701(3)(A) of this title,
24 and the proximate cause of the disability or
25 death was-

carelessness, negligence, lack of proper skill,
error in judgment, or similar instance of fault
on the part of the Department in furnishing the
hospital care, medical or surgical treatment, or
examination; or . . .

(B) an event not reasonably foreseeable; or

(2) the disability or death was proximately
caused by the provision of training and
rehabilitation services by the Secretary
(including by a service-provider used by the
Secretary for such purpose under section 3115 of
this title) as part of an approved
rehabilitation program under chapter 31 of this
title.

26 38 U.S.C. § 1151.

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1 moves for summary judgement, again arguing that the applicable
 2 statute of limitations bars Plaintiffs' present complaint.

3 II.

4 Summary Judgment Standard

5 The standard for summary judgment is straightforward and
 6 well-established. A district court should grant a motion for summary
 7 judgment "if the pleadings, depositions, and answers to the
 8 interrogatories, and admissions on file, together with the
 9 affidavits, if any, show that there is no genuine issue as to any
 10 material fact and the moving party is entitled to a judgment as a
 11 matter of law." FED. R. CIV. P. 56(c); see Lipsett v. University of
 12 P.R., 864 F.2d 881, 894 (1st Cir. 1988). A factual dispute is
 13 "material" if it "might affect the outcome of the suit under the
 14 governing law," and "genuine" if the evidence is such that "a
 15 reasonable jury could return a verdict for the nonmoving party."
 16 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

17 The burden of establishing the nonexistence of a genuine issue
 18 as to a material fact is on the moving party. See Celotex Corp. v.
 19 Catrett, 477 U.S. 317, 331 (1986). This burden has two components:
 20 (1) an initial burden of production, which shifts to the nonmoving
 21 party if satisfied by the moving party; and (2) an ultimate burden of
 22 persuasion, which always remains on the moving party. See id. In
 23 other words, "[t]he party moving for summary judgment, bears the
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1 initial burden of demonstrating that there are no genuine issues of
 2 material fact for trial." Hinchey v. NYNEX Corp., 144 F.3d 134, 140
 3 (1st Cir. 1998). This burden "may be discharged by showing that there
 4 is an absence of evidence to support the nonmoving party's case."
 5 Celotex, 477 U.S. at 325. After such a showing, the "burden shifts
 6 to the nonmoving party, with respect to each issue on which he has
 7 the burden of proof, to demonstrate that a trier of fact reasonably
 8 could find in his favor." DeNovellis v. Shalala, 124 F.3d 298, 306
 9 (1st Cir. 1997) (citing Celotex, 477 U.S. at 322-25).

11 Although the ultimate burden of persuasion remains on the moving
 12 party, the nonmoving party will not defeat a properly supported
 13 motion for summary judgment by merely underscoring the "existence of
 14 some alleged factual dispute between the parties;" the requirement is
 15 that there be a genuine issue of material fact. Anderson, 477 U.S. at
 16 247-48. In addition, "factual disputes that are irrelevant or
 17 unnecessary will not be counted." Id. at 248. Under Rule 56(e) of
 18 the Federal Rules of Civil Procedure, the nonmoving party "may not
 19 rest upon the mere allegations or denials of the adverse party's
 20 pleadings, but . . . must set forth specific facts showing that there
 21 is a genuine issue for trial." FED. R. CIV. P. 56(e); Anderson, 477
 22 U.S. at 256. Summary judgment exists to "pierce the boilerplate of
 23 the pleadings," Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 794
 24 (1st Cir. 1992), and "determine whether a trial actually is
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1 necessary." Vega-Rodriguez v. Puerto Rico Tel. Co., 110 F.3d 174, 178
 2 (1st Cir. 1997).

3 **III.**

4 **Analysis**

5 Subsection (b) of 28 U.S.C. § 2401 (1993) provides:

6 A tort claim against the United States shall be
 7 forever barred unless it is presented in writing
 8 to the appropriate Federal agency within two
 9 years after such claim accrues or unless action
 10 is begun within six months after the date of
 mailing, by certified or registered mail, of
 notice of final denial of the claim by the
 agency to which it was presented.

11 Accordingly, the commencement of an administrative claim with the
 12 appropriate federal agency within two years of the cause of action's
 13 accrual is a jurisdictional prerequisite to filing suit in federal
 14 court pursuant to the FTCA. See Santiago Ramirez v. Secretary of
15 Dep't of Defense, 984 F.2d 16, 18 (1st Cir. 1993) ("Failure to timely
 16 file an administrative claim with the appropriate federal agency
 17 results in dismissal of the plaintiff's [federal suit], since the
 18 filing of an administrative claim is a non-waivable jurisdictional
 19 requirement.") (citations omitted). Thus, to ascertain when the two-
 20 year statute of limitations begins to run, we must first identify
 21 when a cause of action accrues for purposes of 28 U.S.C. § 2401.

22 Before 1979, the First Circuit held that state law determines
 23 when a claim accrues. See Hau v. United States, 575 F.2d 1000, 1002
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(1st Cir. 1978) ("In determining when a claim accrues, for purposes of [the FTCA], this Circuit, unlike other circuits which follow federal law, follows the *lex loci* rule—the applicable law is the law of the state where the claim arose.") (citations omitted). However, in United States v. Kubrick, 444 U.S. 111 (1979), the Supreme Court, although not expressly addressing the question of whether federal or state accrual rules govern FTCA claims, assumed that the federal, and not state, rule controlled. See id. at 118-21 (interpreting federal rule which circuit court had applied). The First Circuit has subsequently not directly considered the validity of its pre-Kubrick precedent. Nevertheless, several cases have followed, without discussion, the Court's approach in Kubrick and applied the federal rule. See Attallah v. United States, 955 F.2d 776, 779 (1st Cir. 1992); Gonzalez-Bernal v. United States, 907 F.2d 246, 249 (1st Cir. 1990); Nicolazzo v. United States, 786 F.2d 454, 455-56 (1st Cir. 1986); Marrapese v. State of R.I., 749 F.2d 934, 943 (1st Cir. 1984); Fidler v. Eastman Kodak Co., 714 F.2d 192, 199 (1st Cir. 1983); Galarza v. Zagury, 702 F.2d 29, 32 (1st Cir. 1983); Heinrich v. Sweet, 44 F. Supp.2d 408, 415 (D. Mass. 1999). The overwhelming majority of other circuits have done similarly. See e.g., Johnson v. United States, 85 F.3d 217, 218 (5th Cir. 1996); Osborn v. United States, 918 F.2d 724, 731 (8th Cir. 1990); Gould v. United States, 905 F.2d 738, 742 (4th Cir. 1990); Sexton v. United States, 832 F.2d 629, 633 n.4

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1 (D.C. Cir. 1987); Zeleznik v. United States, 770 F.2d 20, 22 (3d Cir.
2 1985); Barrett v. United States, 689 F.2d 324, 327 (2d Cir. 1982);
3 Fernandez v. United States, 673 F.2d 269, 271 (9th Cir. 1982);
4 Stoleson v. United States, 629 F.2d 1265, 1268 (7th Cir. 1980).

5 Therefore, we find that federal law determines when a cause of action
6 accrues.

7 The Supreme Court articulated the federal rule in Kubrick.
8 Reversing a lower court's holding that a medical malpractice claim
9 under the FTCA did not accrue until the plaintiff knew or should have
10 known that the doctor who allegedly caused the injury was legally
11 liable, the Court held that a FTCA claim accrues within the meaning
12 of 28 U.S.C. § 2401(b) when the plaintiff knows the existence and
13 cause of her injury. See Kubrick, 444 U.S. at 121-24. The Court
14 reasoned that relieving plaintiffs in medical malpractice suits from
15 exercising reasonable diligence in discovering and protecting their
16 legal rights would undermine the purpose of the statute of
17 limitations, which is to encourage the prompt presentation of claims.
18 See id. at 117. Thus, when a plaintiff has knowledge about the
19 critical facts concerning her injury and its cause, she has a duty to
20 investigate promptly and file a timely claim for relief.

21 In the present case, the parties disagree as to when Plaintiff
22 Juarbe knew or should have known about the cause of his injury.
23 Relying on Hau, Defendant argues that Plaintiffs' cause of action
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1 accrued the date that Plaintiff Juarbe signed the 38 U.S.C. § 1151
2 claim for benefits. In Hau, the Veterans' Administration Hospital in
3 Rio Piedras, Puerto Rico, on September 4, 1974, performed an
4 arteriogram through the plaintiff's right femoral artery. Following
5 the examination, the plaintiff suffered swelling and pain which led
6 him to see two doctors who suggested that he consult a specialist.
7 Subsequent to visiting the specialist's office and finding him
8 occupied in a lengthy meeting, the plaintiff on November 11, 1974,
9 sent him a letter in which he stated that "[d]ue to the negligence of
10 the hospital [in conducting the arteriogram] I have become disabled."
11 Hau, 575 F.2d at 1001. On March 19, 1975, the plaintiff visited
12 another specialist who diagnosed the problem as a femoral nerve
13 injury of undetermined cause. See id. Over two years after the
14 plaintiff sent the letter to the first specialist, the plaintiff
15 filed an administrative claim against the Veterans' Administration
16 Hospital in Río Piedras. See id. On April 18, 1977, the Veterans'
17 Administration denied the claim. See id. The plaintiff subsequently
18 instituted a FTCA action against the same hospital which the district
19 court dismissed on statute of limitations grounds.

20 On appeal, the First Circuit considered whether the plaintiff
21 had filed a timely FTCA claim pursuant to 28 U.S.C. § 2401(b).
22 Finding that Puerto Rico law reflected federal law in determining
23 when a claim accrues for FTCA purposes, the Circuit held that "a
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1 claim for malpractice accrues against the Government when the
 2 claimant discovered, or in the exercise of reasonable diligence
 3 should have discovered, the acts constituting the alleged
 4 malpractice.'" Id. at 1002 (quoting Quinton v. United States, 304
 5 F.2d 234, 240 (5th Cir. 1962)). Applying the test to the case before
 6 it, the First Circuit found that the cause of action accrued when the
 7 plaintiff wrote the letter stating that he believed that he had been
 8 the victim of medical malpractice by the VA Hospital in Río Piedras.
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10 See id.

11 Analogizing the facts in Hau to the present case, Defendant
 12 asserts that Plaintiff Juarbe on February 10, 1993, stated in a claim
 13 for benefits that the VA Hospital negligently performed cervical
 14 surgery on him, thereby worsening his condition. Consequently,
 15 Defendant proposes that we should consider February 10, 1993, as the
 16 date of accrual. Since Plaintiffs did not file their administrative
 17 claims with the Veterans' Administration on or before February 10,
 18 1995, but instead filed them on February 20, 1996, Defendant contends
 20 that Plaintiffs' present action is time barred.

21 Plaintiffs contest Defendant's reasoning and conclusion. They
 22 cite Nicolazzo for the proposition that the cause of action for a
 23 FTCA medical malpractice claim accrues at the time that a correct
 24 diagnosis is made, rather than the date at which the plaintiff
 25 realized the potential legal liability of his health providers. In
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1 Nicolazzo, a veteran sustained an ear injury in a 1969 helicopter
2 crash while serving in the United States Army. See Nicolazzo, 786
3 F.2d at 454. At the time of his discharge from the service in 1971,
4 the plaintiff's symptoms included constant ringing and some hearing
5 loss in his left ear, occasional loss of balance, and chronic
6 drainage and infections in the left ear. See id. From 1972 to 1980,
7 the plaintiff saw several VA doctors and one private practitioner for
8 the injury on approximately ten different occasions, resulting in
9 various diagnoses and treatments. See id. at 454-55. None of these
10 significantly improved his condition. See id. at 455. In October
11 1980, the plaintiff consulted a new doctor who diagnosed the problem
12 as "a chronic infection at the site of the skull fracture incurred in
13 the helicopter crash and from a cholesteatoma resulting from that
14 infection." Id. Following surgery and a treatment of antibiotics,
15 the plaintiff's ear condition improved significantly. See id. After
16 filing an administrative claim in December 1981 and having it denied
17 by the government, the plaintiff filed a FTCA suit in federal court
18 in October 1982. See id. Reversing the district court's grant of
19 summary judgement on statute of limitations grounds, the First
20 Circuit determined that the plaintiff's FTCA was not time barred. See
21 id. Following the reasoning in Kubrick, the court held that the
22 statute of limitations in 28 U.S.C. § 2401(b) did not begin to run
23 until the plaintiff had received the correct diagnosis in October
24 25
26 until the plaintiff had received the correct diagnosis in October

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1 1980. See id. at 456. The First Circuit explained that the
 2 plaintiff's "cause of action for medical malpractice is not based on
 3 discovery of the injury but on the assertion that competent doctors
 4 would have done the extensive tests and x-rays that would have
 5 discovered the relatively elusive cause of that injury." Id.

6 Similarly, Plaintiffs maintain that the cause of action in this
 7 case accrued on February 21, 1994, the date that Plaintiff Juarbe
 8 allegedly received a correct diagnosis of his condition as "foix-
 9 alajouanine syndrome which is believed to be the cause of his spinal
 10 cord infarction" by the doctors at Walter Reed. Docket Documents
 11 Nos. 52, p. 5; 53. Plaintiffs assert that this condition amounts to
 12 an arteriovenous malformation at the thoracic cord level. See Docket
 13 Document No. 72, p. 4. Before this date, Plaintiffs claim that other
 14 medical practitioners had failed to diagnose correctly Plaintiff
 15 Juarbe's condition and, consequently, subjected him to treatment
 16 carrying undisclosed risks and complications. However, following the
 17 correct diagnosis, Plaintiffs allege that they inquired further with
 18 other doctors and lawyers about whether the VA Hospital had
 19 negligently treated Plaintiff Juarbe. They eventually filed
 20 administrative claims against the hospital on February 20, 1996.
 21 Since the administrative actions were filed within the two-year
 22 statute of limitations, Plaintiffs contend that their FTCA action is
 23 not time barred.
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1 Thus, the initial question we face is whether Hau or Nicolazzo
 2 control this case. Since we question the continued validity of Hau
 3 after Kubrick, we find that Nicolazzo governs the time of accrual.
 4 To determine when the plaintiff discovered the alleged malpractice,
 5 the court in Hau examined the factual circumstances before it. See
 6 Hau, 575 F.2d at 1002. The court found that the letter written by
 7 the plaintiff on November 11, 1974, indicated that he was aware of
 8 the harmful effects of the treatment and that the Hospital allegedly
 9 committed acts constituting malpractice. See id. Hence, the holding
 10 in Hau turned on the plaintiff's "unequivocal imputation of
 11 negligence on the part of the Veteran (sic) Administration Hospital,"
 12 which convinced the court that the plaintiff was well aware of facts
 13 that would have alerted a reasonable person to conclude that the
 14 hospital had negligently treated his condition. Id. at 1002-03. The
 15 Supreme Court in Kubrick, however, expressly rejected a lower court's
 16 holding that a medical malpractice claim under the FTCA accrues when
 17 the plaintiff knew or should have known that a medical practitioner
 18 may be legally liable. See Kubrick, 444 U.S. at 119-20, 123. Rather,
 19 the Supreme Court held that when the plaintiff knows the critical
 20 facts concerning his injury and its cause, i.e., the factual
 21 predicate for a malpractice claim, then the cause of action accrues
 22 for section 2401(b) purposes. See id. at 121 n.8, 123-24. Thus, the
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1 court's reliance in Hau on the plaintiff's awareness that he may have
 2 been the victim of a negligently performed procedure is misplaced.

3 Other courts support our finding, since we could not find a
 4 single court after Kubrick which has followed the reasoning or
 5 holding in Hau. On the other hand, numerous courts have cited
 6 Nicolazzo as authority for their decisions. See, e.g., MacMillan v.
 7 United States, 46 F.3d 377, 382 (5th Cir. 1995); McDonald v. United
 8 States, 843 F.2d 247, 249 (6th Cir. 1988); Osborn, 918 F.2d at 733;
 9 Chamness By and Through Chamness v. United States, 835 F.2d 1350,
 10 1353 (11th Cir. 1988); Schock v. United States, 21 F. Supp.2d 115, 119
 11 (D.R.I. 1998); Magdalenski v. United States, 977 F. Supp. 95, 100 (D.
 12 Mass. 1997).

14 To apply Nicolazzo to the case before us, we must determine
 15 whether Plaintiffs filed their administrative claims within two years
 16 of Plaintiff Juarbe receiving a correct diagnosis of his condition.
 17 Plaintiffs claim that Plaintiff Juarbe received a correct diagnosis
 18 on February 21, 1994. In all their submissions in support of their
 19 motion for summary judgement, Defendant does not contest this
 20 proffer. After reviewing the record and taking the parties'
 21 positions into account, we find that Plaintiff Juarbe did not receive
 22 a correct diagnosis until the date that he proposes. Since
 23 Plaintiffs filed their administrative claims within section 2401(b)'s
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1 two-year statute of limitations, we find their FTCA suit is not time
2 barred.

3 Given our findings, we need not consider the equitable tolling
4 issues raised by the parties.

5 **IV.**

6 **Conclusion**

7 In accordance with the foregoing, we **DENY** Defendant's motion for
8 summary judgment, Docket Document No. 45.

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10 **IT IS SO ORDERED.**

11 San Juan, Puerto Rico, this

12 *10th* day of May, 2000.

13 
JOSE ANTONIO FUSTE
14 U. S. District Judge

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